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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

NO. 860

ILLINOIS PROTESTANT CHILDREN'S HOME, An Illinois Not For Profit Corporation,

Petitioner,

vs.

DEPARTMENT OF PUBLIC WELFARE OF STATE OF ILLINOIS, OTTO BETTAG, Director, CLARK MILEY, Hearing Officer,

Respondents.

(PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.)

BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR CERTIORARI.

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JURISDICTIONAL QUESTION PRESENTED.

DID PETITIONER NOT ONLY FAIL TO PRESERVE BUT WAIVE ITS ALLEGED CONSTITUTIONAL QUESTIONS BY TAKING ITS APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, NOT DIRECTLY TO THE SUPREME COURT OF ILLINOIS BUT TO THAT STATE'S APPELLATE COURT FOR THE FIRST DISTRICT IN VIEW OF ILLINOIS' RULE OF APPELLATE JUDICATURE, CONSISTENTLY RECOGNIZED BY THIS COURT IN CASES COMING TO IT FROM ILLINOIS, THAT THE FAILURE TO TAKE ILLINOIS' PERMISSIBLE DIRECT APPEAL TO HER SUPREME COURT WAIVES ALL STATE AND FEDERAL CONSTITUTIONAL QUESTIONS?

ARGUMENT.

I.

Illinois has always permitted direct appeals from trial courts to her Supreme Court where substantial Federal or State constitutional questions are involved and has always held that an appeal to the Appellate Court in such cases, although permissible, waives all constitutional questions. This Court has always recognized this principle of Illinois' judicature as a bar to appeal or certiorari. Therefore there is no jurisdiction to review this case on certiorari.

Illinois permits direct appeals from her trial court to her Supreme Court in cases involving a construction of the Federal or her own Constitution, either as applied to a statute generally or in constitutional focus on the facts of a particular case.

Alternatively, Illinois permits appeals to her Appellate Courts where constitutional questions are presented but consistently rules that where appeals to those Courts are taken, all constitutional questions are waived.

This Court has *invariably* denied or dismissed *certiorari* and has always dismissed appeals or its former writs of error in cases where an Illinois litigant took his appeal, not directly to the Supreme Court of Illinois but to an Appellate Court, and that fact has been called to this Court's attention as a waiver of all constitutional questions and a consequent bar to this Court's jurisdiction.

Parker v. Illinois, 333 U. S. 571.

In the *Parker* case, 333 U. S. 571, this Court granted *certiorari* to review a substantial question as to whether Parker, who had been ordered by an Illinois Circuit Court to produce certain records and had then been held in contempt for filing them with the clerk when they proved or were deemed to be scandalous, was thereby denied due process of law. 332 U. S. 845.

But on plenary consideration, it was called to the Court's attention that petitioner had taken his appeal, not directly to the Supreme Court of Illinois but to the Appellate Court of that State.

The Court, holding that Parker's appeal to Illinois' Appellate Court waived his otherwise presumably substantial Federal constitutional question, said at pages 574-75:

> "When federal rights are involved, it is, of course, for this Court finally to determine whether the failure to follow the procedure designed by a State for their protection constitutes a waiver of them. *Davis* v. *O'Hara*, 266 U. S. 314; *Central Union Co.* v. *Edwardsville*, *supra*. The Court said in the *Edwardsville* case that when the waiver is found on a failure to comply with the appellate practice of a State, the question turns on whether that practice gives litigants 'a reasonable opportunity to have the issue as to the claimed right heard and determined' by the state court. 269 U. S., pp. 194-195. It was there held that the Illinois practice of requiring constitutional questions to be taken directly to the Illinois Supreme Court and of refusing to review them if review was first sought in the Appellate Court satisfied the requirement. We adhere to that decision. The channel through which the constitutional questions, raised by petitioner in his attack on the amended order, could not have been taken

all the way to this Court was not only clearly marked, it was also open and unobstructed."

Similarly, in *Central Union Co.* v. *Edwardsville*, 296 U. S. 190 and *Penn. R. Co.* v. *Illinois Brick Co.*, 297 U. S. 447 this Court, having taken those cases for review, perceived on full argument, that petitioners ere had taken their cases, not directly to the Supreme Court of Illinois but to that State's Appellate Courts, recognized that under Illinois' principles of judicature such appeal waived all Federal constitutional questions and dismissed the cases for want of jurisdiction.

We submit that a like result must follow in this case.

II.

Even if this Court has jurisdiction to grant certiorari, the writ should be denied for want of merit and lack of national moment.

This case presents only a question whether Illinois' administrative and judicial tribunals correctly or erroneously assayed the weight of conflicting evidence and assessed the competitive merits of contrary inferences to be drawn from that evidence.

For vindication of the decisions of those State tribunals upon the merits of the questions presented, we adopt the opinion of the Appellate Court of Illinois.

In any event no question of moment to the national jurisprudence is tendered by this petition.

For these reasons the writ should be denied if this petition is not to be dismissed for want of jurisdiction, as we submit that it must be.

Respectfully submitted,

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